

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA JAY CARR,

Defendant-Appellant.

UNPUBLISHED

March 20, 2008

No. 273778

Genesee Circuit Court

LC No. 06-018117-FH

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 120 to 480 months for the home invasion conviction, 48 to 240 months for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant and his former girlfriend, Leah Amaya, lived together until their breakup in 2005, after which defendant worked in Louisiana. Amaya is the mother of defendant's son. Amaya lives next door to Amy Leithauser and her boyfriend, David Clark, with whom she is also friends. Defendant and Clark also had a friendship, and Clark accompanied defendant to Louisiana but returned shortly thereafter. Defendant returned to Michigan in November 2005. After his return, defendant had frequent visitation with his son, but he and Amaya had a tumultuous relationship. According to Amaya, defendant was depressed and frequently threatened to harm himself because she would not reconcile with him.

On December 23, 2005, defendant attempted unsuccessfully to arrange visitation for the holidays. On December 24, 2005, beginning at approximately 2:00 a.m., defendant began leaving threatening voicemails. At approximately 3:00 a.m., Amaya, who was staying at her grandmother's house, telephoned Leithauser to tell her that defendant was looking for her and their son and that he may come to their house.

Leithauser testified that after receiving Amaya's warning call, she advised Clark and returned to sleep. Between 3:30 and 4:00 a.m., Clark told Leithauser that defendant was in the house and directed her to call 911. Clark testified that defendant pulled into Amaya's driveway and got out of his truck with a shotgun that discharged once toward the ground as defendant was walking. Clark then saw defendant walk up his driveway, open the screen door, punch out the window, reach in, and unlock the door. As defendant ran upstairs, Clark met him, sprayed him with pepper spray, and a struggle ensued. The two men fell down the stairs, with defendant still holding the shotgun. Defendant punched Clark, pushed his thumb in his right eye, bit him, and choked him. Clark yelled for Leithauser.

Leithauser testified that as she was dialing 911, she heard defendant yell threats to kill, and when she went downstairs, defendant was choking Clark. Leithauser knocked defendant off Clark, the three struggled briefly, and Leithauser and Clark took the shotgun. Defendant demanded the shotgun so that he could kill Leithauser and Clark and then threatened to kill himself. The telephone rang and defendant asked Leithauser if she had called the police. When Leithauser answered affirmatively, defendant announced that he was leaving, went into the kitchen, picked up a knife, cut his throat and wrist with the knife, and left the premises. Neighbors across the street observed defendant leave the house, and another male running after him, holding the shotgun, urging defendant to wait for an ambulance because he was going to bleed to death. Defendant then left.

The police responded to a call at defendant's mother's house where they found defendant bleeding heavily from his wrists and losing blood. Defendant was transported to the hospital. Defendant's mother gave testimony about defendant's history of mental illness and his prescribed medications. She also testified that on December 24, 2005, he was not acting like himself. Dr. Harold Sommerschild, a licensed psychologist, testified that he evaluated defendant and concluded that defendant had an adjustment disorder with depressed mood, and that defendant was depressed. During the interview, defendant stated that he went to Amaya's house to arrange visitation with his son and, because Amaya was not home, he went to her friend's house next door. He had a gun because he intended to kill himself, but left it outside, next door to Amaya's house. Defendant stated that the next thing he remembered was being in the hospital and noticing that his arm was injured. Dr. Sommerschild concluded that defendant was competent to stand trial and was not insane.

II. Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings

would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Conceding Guilt and Failure to Present a Substantial Defense

Defendant argues that defense counsel “conceded every element of every offense charged,” and failed to present the substantial defense that “defendant only intended to harm himself.” “A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Furthermore, a complete concession of the defendant’s guilt renders counsel ineffective. *People v Krysztopanec*, 170 Mich App 588, 596; 429 NW2d 828 (1988), lv den 432 Mich 873 (1989).

The record does not support defendant’s claims. It is clear from defense counsel’s questions and remarks that he did not concede every element of the offenses charged. Rather, he argued that defendant did not have the requisite intent to support the charges of first-degree home invasion¹ or assault with intent to do great bodily harm less than murder.² In particular, defense counsel argued that defendant had a mental illness, only intended to harm himself, and had permission to enter the house. This strategy is evident from the beginning of defense counsel’s opening statement, in which counsel remarked:

The evidence is going to show that even before this incident ever occurred
[defendant] suffers from a mental condition

* * *

The evidence is going to show that even prior to this incident [defendant]
was trying to take his own life a number of times. . . .

The evidence is going to show us that unfortunately on that evening that
[defendant] went to his girlfriend’s house *not to harm anybody but himself*.

¹ The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004), lv den 471 Mich 873 (2004); MCL 750.110a(2).

² “Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), lv den 459 Mich 971 (1999).

The evidence is going to show maybe he wanted to make a statement and kill hisself [sic] in front of his girlfriend and his kid. I don't know. *But the evidence is going to show us that that was his intent, to take his own life.*

* * *

They are not going to be able to show you any evidence where a glass pane window was broken and there's glass on the inside of the house. You have to use your common sense when you hear testimony come from that stand.

The evidence is clearly going to show that [defendant] was let in the house by David Clark.

* * *

The evidence is further going to show that when he attempted to go up the stairs, that's when David Clark jumped him. They fell back down the stairs, they had a scuffle, and Amy Leithauser then got into it.

And what happened was, the evidence is clearly going to show, is that *"Let me up, I'm going to finish this, I'm going to kill myself."* The evidence is going to show that [defendant] walked into the kitchen, got a knife, slit his throat and his wrist, and then attempted to drive to his parents' home.

* * *

The evidence is going to show that *the only person that [defendant] ever tried to harm is himself.*

* * *

You don't have Home Invasion. You don't have Assault With Intent to Commit Great Bodily Harm unless you're gonna find him guilty of trying to kill himself. You're gonna find that there was a struggle, true enough, but the struggle was not to harm David Clark. *The struggle was all about harming himself.*

* * *

The evidence is clearly going to show that this man, based upon his mental conditions, can't do things like the normal person, and in the end he tries not to harm anyone but himself. *He's not guilty of these crimes. He's guilty of trying to take his own life.*

During the testimony, defense counsel vigorously challenged the pivotal issue of whether defendant intended to harm anyone other than himself. Defense counsel continually questioned the prosecution witnesses regarding defendant's specific actions and words. Defense counsel emphasized that defendant repeatedly threatened to kill himself and eventually slit his own wrist and throat before leaving Clark and Leithauser's house. Defense counsel presented a responding

police officer, who testified that neither Clark nor Leithauser stated that defendant threatened to kill them. The officer further testified that both Clark and Leithauser stated that defendant wanted to harm himself and slit his own throat and wrist with a knife. Defense counsel noted that Clark did not testify that defendant pointed a gun at either him or Leithauser, and that it was Clark who sprayed pepper spray on defendant and then jumped on him. When Clark testified that defendant choked him and stuck his thumb in his eye, defense counsel elicited on cross-examination that Clark had no injury to his eye and that the photograph depicting his neck injuries showed only some redness. Defense counsel also elicited from a police identification technician that she saw only a “little scratch” and no bruising on Clark’s neck.

Defense counsel also emphasized that Clark’s neighbors, who were neutral witnesses, testified that as defendant was leaving, Clark ran after him, urging him to wait for an ambulance. In his closing argument, defense counsel queried “why a person would ask anybody, ‘Wait, don’t leave, wait on the ambulance,’ if [that person] broke into the house and had tried to kill [him] and [his] girlfriend . . .”. Defense counsel asserted that defendant was mentally ill, and that the illness had risen to the level of insanity because he could not find his son. During defense counsel cross-examination of Dr. Sommerschield, the psychologist agreed with defense counsel’s statement that the separation from a child can “send people off their rocker . . .”.

In sum, the record does not support defendant’s claim that defense counsel was ineffective by conceding defendant’s guilt of the charged offenses. To the extent that defendant relies on the fact that defense counsel’s arguments were not successful, nothing in the record suggests that defense counsel’s presentation of the arguments was unreasonable or prejudicial. Counsel’s decision about how to argue the evidence to the jury was a matter of trial strategy. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockett*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. Insanity Defense

Defendant also argues that defense counsel was ineffective for failing to introduce “medical testimony” to support his insanity defense.³ We disagree.

The record discloses that defense counsel questioned defendant’s mother and Amaya about defendant’s history of mental illness and defendant’s prescribed medications. Although

³ The test for criminal insanity is found in MCL 768.21a. “An individual is legally insane if, as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.” Mental illness is “a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” MCL 330.1400(g). MCL 768.21a (1). “Mental illness . . . does not otherwise constitute a defense of legal insanity.” *Id.* The defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. MCL 768.21a(3).

counsel did not call a psychologist, defense counsel thoroughly questioned Dr. Sommerschield, a fully licensed psychologist, who was ordered to conduct an independent forensic psychological evaluation to determine if defendant was legally insane. Dr. Sommerschield based his opinion on an interview of defendant that lasted less than three hours, a battery of tests, defendant's medical history, forensic reports, and the police reports. Although Dr. Sommerschield found that defendant was depressed and had an adjustment disorder with depressed mood, he concluded that defendant was legally responsible for his actions because he did not have a significant mood or thought disorder that would have prevented him from knowing right from wrong or from conforming his behavior to the law. Dr. Sommerschield noted that defendant was evaluated by the Community Health Forensic Center and that the doctor there also found that defendant had a major depressive reaction disorder, but that no psychotic features were present and defendant was legally responsible for his behavior. Dr. Sommerschield explained that defendant did not have a psychotic element to his depression, or to his previous diagnosis of bipolar disorder.

Defense counsel chose to rely on Dr. Sommerschield's psychological evaluation, defendant's medical history, and the facts of this case. Defendant does not assert any irregularity with Dr. Sommerschield's evaluation that required defense counsel to seek additional medical testimony. Significantly, defendant does not indicate what "medical testimony" should have been presented, nor has he shown that other supportive medical evidence even exists. Although defendant suggests that defense counsel could have presented this issue more extensively, we will not assess counsel's competence with the benefit of hindsight. *Rockey, supra*. On this record, defendant has not overcome the presumption that defense counsel's representation was effective. *Effinger, supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

C. Nullification of Right to a Jury Trial

Lastly, defendant argues that he is entitled to a new trial because the effect of defense counsel's complete concession of guilt and failure to present a defense "nullified" his right to a jury trial. Because this argument is simply a reiteration of the claim discussed in section II (A), we reject it for the same reasons.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder